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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER MALDONADO, Defendant and Appellant.	G038918 (Super. Ct. No. 00NF2681) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Douglas G. Benedon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Francisco Javier Maldonado appeals from a judgment after a jury convicted him of voluntary manslaughter and found true he personally used a dangerous or deadly weapon, a knife. He argues the trial court erroneously admitted his *coerced* confession, and an improper hypothetical question based on evidence not admitted at trial, and the prosecutor committed misconduct when he asked the expert witness the hypothetical question and relied on it during rebuttal argument. Although we agree the hypothetical was improper, we conclude he was not prejudiced. Maldonado's claims his confession was involuntary and the prosecutor committed misconduct have no merit, and we affirm the judgment.

FACTS

In our prior unpublished opinion *People v. Maldonado* (Feb. 8, 2005, G032014), we explained that at Maldonado's first murder trial, the jury deadlocked 10 to 2, and the trial court declared a mistrial. At his second jury trial, the jury convicted him of murder with an enhancement for the personal use of a dangerous or deadly weapon. However, we reversed his conviction because the trial court erroneously gave the jury a "dynamite" instruction inconsistent with our Supreme Court's holding in *People v. Gainer* (1977) 19 Cal.3d 835.

At his third murder trial, the jury could not reach a verdict, and the trial court again declared a mistrial. This appeal concerns his fourth murder trial, and the following evidence was admitted at trial.

When Maldonado was 16 years old, he worked as an attendant at a gas station owned by Richard Hale; Hale was on vacation the second week of August 1991. On the morning in question, Harold Doorenbos, the assistant manager, relieved Maldonado at 12:00 a.m.

At approximately 3:48 a.m., Officer Brian Carrion received a dispatch to go to the gas station. When Carrion arrived, he spoke to a witness, walked to the gas station

kiosk, and saw a man, later identified as Doorenbos, lying inside the kiosk, in a pool of blood, dead.

Forensic Services Supervisor James Conley arrived and processed the evidence. Conley found a safe lid covered in blood, and three shoe prints in blood stains. He also found a broken knife blade in a piece of rolled carpet, and the knife handle in another location. There was money in the cash drawer. An autopsy revealed Doorenbos had stab wounds to his face, neck, back, chest, and abdomen, and defensive wounds. He had a shoe print on his forehead, and blunt force trauma to the head consistent with a safe lid being dropped on his head. He bled to death as a result of the stabbing and blunt force trauma.

A few days later, Officer Paul Gallagher interviewed Maldonado at the police station. Maldonado stated he had been in the United States for one year. He explained that on the night of the incident, he was at work with his cousin, Francisco Maldonado Zamora, and another employee, Miguel Rodriguez, and they were goofing off, but it was a normal evening.[1] He stated that at about 12:30 a.m., he bought two beers for Doorenbos. Maldonado consented to a search of his apartment and showed police his shoes. Two days later, Maldonado went to Mexico. Approximately eight years later, Maldonado returned to the United States to seek medical care because he is HIV positive.

In August 2000, pursuant to an arrest warrant, law enforcement officers were conducting surveillance of Maldonado's residence when they saw him and two women (his mother and wife) leave in a car at approximately 7:00 a.m. Officers pulled over the car and arrested Maldonado. His mother, Mary Maldonado (Mary), said he was HIV positive and needed medication. Officers took him to the police station.

Because the voluntariness of Maldonado's statements is the subject of his first argument, we will detail the circumstances of the interview and his statements

[1] At trial, a customer testified he saw three men at the gas station at approximately 9:00 p.m., just hours before Doorenbos started his shift.

below. Suffice it to say, after officers left Maldonado alone in the interview room for three hours, Officer John Duran advised him of his *Miranda*[2] rights, and Duran and Officer Paul Gallagher questioned him for two and one-half hours. After initially denying any involvement in Doorenbos's murder, Maldonado admitted he stabbed him.

An information charged Maldonado with murder and alleged he personally used a dangerous or deadly weapon, a knife. (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1).)[3]

Before trial, Maldonado filed a motion to suppress his August 2000 interview with Duran. The parties stipulated the trial court could consider the videotape of the interview and the transcript from the Evidence Code section 402 hearing on the motion to suppress at the third trial in May 2006. After considering the evidence and hearing argument, the trial court denied Maldonado's motion, ruling he knowingly and intelligently waived his *Miranda* rights and his statements were voluntary.[4]

At trial, the videotape of Maldonado's confession was played for, and transcripts of the interview were provided to, the jury. The parties stipulated Rodriguez pled guilty to second degree murder of Doorenbos and at that point he had served over 15 years in prison. Rodriguez claimed he had never seen Maldonado in his life and he did not commit the murder with him.

Maldonado offered the testimony of Mary, his mother. She testified Maldonado had been released from the hospital eight days before he was arrested, he had

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] All further statutory references are to the Penal Code, unless otherwise indicated.

[4] Actually, the trial court denied the motion, twice. After the trial court viewed the redacted videotape the parties stipulated he watch and the court denied the motion, defense counsel indicated the court viewed the wrong videotape. The court watched the complete videotape and again denied the motion.

"third degree AIDS and tuberculosis[,]" and he had to take medication twice a day. She explained that on the morning he was arrested, Maldonado had to drive his wife to work because he was the only person who could drive, and she went with them because "he was very sad and had a lot of pain." She said "he was very thin and he could barely walk." She stated that after officers arrested Maldonado, she told one of the officers he was ill and he needed to take his medication. She arranged for her daughter to bring the medication to the police officers and one of the officers let her call Duran to ask him to give the medication to Maldonado.

Maldonado also offered the testimony of Dr. Marcia Alcouloumre. Alcouloumre testified she treated Maldonado for AIDS for approximately one year in 1999 and 2000. She stated that in July 2000, he had AIDS, tuberculosis, shingles, and neuropathy, and he was taking three medications for AIDS and approximately five medications for his other illnesses. She explained food and water are particularly important for an AIDS patient because they lose weight and need to maintain kidney function and blood pressure. She said AIDS can affect a person's ability to think clearly because the virus can infiltrate the brain. On cross-examination, Alcouloumre testified that during the time she treated Maldonado his weight increased, and in July 2000, he was feeling better. She admitted missing one dose of medication would not have any outward manifestations, and neuropathy would not cause someone to lie.

Maldonado offered the testimony of Dr. Mark Costanzo, a psychology professor. When defense counsel asked what types of cases he accepts, Costanzo responded, "[He] accept[s] cases in which there is some sort of a recording of the interrogation and where there is no strong physical evidence implicating the suspect, something like fingerprints or DNA, that sort of thing." He opined interrogations are an important investigative tool and the majority of confessions are true because there is strong supporting evidence. He explained that 24 percent of DNA-established wrongful convictions were based on wrongful confessions. He stated there are four types of false

confessions and the most common type is "a coerced confession where someone in the course of interrogation reaches the conclusion that they need to confess because it's in their self-interest to confess or because it's the only way they can get out of the room." After explaining the difference between an interrogation and an interview, Costanzo discussed various interrogation tactics. Costanzo stated he watched the videotape of Maldonado's confession, and he testified concerning the various interrogation tactics officers used against Maldonado, including memory ploys, evidence ploys, believability, motive, and fatigue.

On cross-examination, the prosecutor asked Costanzo whether he interviewed Maldonado's father, and he replied he did not. When the prosecutor asked Costanzo whether he was aware of Maldonado's father's statements to police, he said he was not, and defense counsel objected on hearsay grounds. At sidebar, the prosecutor indicated he had a police report that stated Maldonado told his father that he killed Doorenbos. The trial court indicated it would review the police report and Costanzo's direct testimony. The court asked counsel to research the issue and be prepared to argue the evidence's admissibility. After hearing counsel's argument and considering Maldonado's written opposition, the court ruled the prosecutor could ask Costanzo whether he was aware of Maldonado's father's statement to the police because it is relevant to the basis of his opinion and his possible bias. The court indicated it would give the jury a limiting instruction it could consider the evidence only for determining Costanzo's credibility and not for its truth.

When cross-examination resumed, the prosecutor asked Costanzo if the fact Maldonado had admitted to his father that he killed Doorenbos would impact his testimony. After the trial court gave the jury a limiting instruction and defense counsel objected numerous times, Costanzo explained it was relevant, but it would depend on the nature and context of the statement. When the prosecutor tried to show Costanzo exhibit No. 44, the police report, defense counsel again objected, and the trial court requested a

sidebar conference. After denying Maldonado's motion for a mistrial, the court instructed the prosecutor to not reference the police report any further.

When cross-examination resumed, the prosecutor asked Costanzo whether it would affect his testimony if Maldonado's statement to his father was in a "nonpolice environment." When Costanzo stated he could not answer without reviewing the entire statement, the prosecutor asked, "So you don't know if the statement was made . . . defendant admitted to his father hypothetically that he was involved with the killing of . . . Doorenbos, you don't know if that would impact your testimony here in a court of law?" Defense counsel objected, and after a short discussion out of the presence of the jury, the court overruled the objection. After Costanzo testified he would need to review any reports to determine whether a statement was relevant, the prosecutor asked him whether that included exhibit No. 44, the police report. Costanzo replied he does not generally consider all the evidence.

During closing argument, the prosecutor argued Costanzo was biased because he did answer the prosecutor's questions, but he did not mention Maldonado's father, or Maldonado's statement to his father. Defense counsel argued if Maldonado's father's testimony was so important, the prosecutor could have subpoenaed him to testify. After an off the record discussion, defense counsel concluded her closing argument. Before rebuttal, the trial court allowed the prosecutor, over defense counsel's objection, to show the jury a slide that read: "[1.] 'Counsel commented on People's lack of bringing in multiple [witnesses] who had made statements in the case.' [¶] [2.] 'Both parties have the power of the courts to bring witnesses to court.' [¶] [3.] 'Statement to the father re[garding] him killing . . . Doorenbos was subject brought up with defense witness Costanzo.'"

During rebuttal argument, the prosecutor relied on the slide to argue if Maldonado's father had favorable evidence, he would have testified, and if the prosecutor could have located him, the prosecutor would have subpoenaed him to testify. The trial

court overruled defense counsel's objection and instructed the jury they were the exclusive judges of the facts. The prosecutor then argued Maldonado's father would have been subpoenaed if he could have been found, an evidentiary rule prevented the jury from seeing the police report, and the jury could draw reasonable inferences from the hypothetical question regarding Maldonado's statement to his father subject to the trial court's instructions. The trial court later gave the jury a limiting instruction.

In June 2007, the jury acquitted Maldonado of murder, but convicted him of the lesser included offense of voluntary manslaughter. The jury found true he personally used a dangerous or deadly weapon, a knife. The trial court sentenced him to prison for 11 years. Because of his abundant credits for time served, Maldonado was released from prison on January 29, 2008.

DISCUSSION

I. Confession

Maldonado argues the trial court erroneously denied his motion to suppress his confession because his statements were involuntary. We disagree.

"A defendant's admission or confession challenged as involuntary may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary. [Citations.] A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity. [Citations.] On appeal, we review independently the trial court's determination on the ultimate legal issue of voluntariness. [Citation.] But any factual findings by the trial court as to the circumstances surrounding an admission or confession, including '"the characteristics of the accused and the details of the interrogation" [citation],' are subject to review under the deferential substantial evidence standard. [Citation.] [¶] In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider 'the totality of circumstances.' [Citations.] Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation];

its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 635, 659-660.)

A. The May 2006 Evidence Code Section 402 Hearing Before The Third Trial

At the hearing, Duran testified officers arrested Maldonado between 7:00 a.m. and 7:30 a.m., and took him to the police department where he was interviewed at approximately 10:00 a.m. Maldonado was placed in a six by ten-foot room with a table and two chairs. The room has no windows and one door. Duran stated that before the taped interview, he did not speak with Maldonado or make any threats or promises. Both Duran and Gallagher were wearing street clothes and neither man was armed. Duran also said Gallagher did not threaten Maldonado or make him any promises. On cross-examination, Duran stated officers arrested Maldonado closer to 7:00 a.m., and the interview started closer to 10:30 p.m. Duran asked someone to bring Maldonado's medication to the police department because Maldonado told him he was HIV positive. Duran said Maldonado was alone in the interview room for approximately three hours. He explained that after he advised Maldonado of his *Miranda* rights and Maldonado waived those rights, the interview lasted "at least an hour[.]" Duran admitted he did not offer Maldonado anything to eat or give him his medication, but he "possibly g[a]ve him something to drink[.]" Duran stated he asked Maldonado if he needed his medication at the end of the interview and later learned his sister had brought the medication to the police station.

Alcouloumre also testified at the hearing, consistent with her testimony at trial that we detail above. Of particular importance here, on cross-examination, she admitted missing one dose of medication or one meal would not pose any immediate outward manifestations.

Finally, Maldonado testified at the hearing. He explained that when officers interviewed him he was sick, weak, and tired. He stated officers did not offer

him anything to eat or drink, and he was hungry and thirsty. Maldonado explained he had not taken his medication because he had to take his wife to work. On cross-examination, Maldonado stated that before the interview he told officers he had to have breakfast and drink his medication, and the officer responded they did not have anything to give him. He said the interview lasted more than one hour and he never asked for anything to drink. He said his thirst and hunger did not cause him to say anything inaccurate. When asked whether his hunger and thirst prevented him from recalling what the officers were talking about, Maldonado replied, "sometimes I do." On redirect examination, Maldonado stated he admitted he stabbed Doorenbos during the interview because he was tired, weak, hungry, thirsty, and did not have any medication. On recross-examination, he denied stabbing Doorenbos.

B. The Interview

After Duran told Maldonado he was detained and advised him of his *Miranda* rights, Maldonado agreed to speak with the officers about the murder. Maldonado explained he worked the 6:00 p.m. to midnight shift and Doorenbos relieved him. Maldonado was at the gas station with Zamora and Rodriguez. He stated that when his shift ended, he went across the street to buy Doornebos a couple beers and when he returned, Zamora and Rodriguez were hitting Doorenbos. He said Rodriguez was hitting him with a metal wrench. Maldonado stated he fled to Mexico because he was scared and he returned to the United States because he is HIV positive. Duran told Maldonado they had spoken to witnesses and his family, and he urged Maldonado to tell the truth. Maldonado said he had spoken to his father and told him he was "innocent." When Duran asked him whether he had problems at work, Maldonado said he stole money, but he returned it.

After Gallagher said his story "[would] not work for [him] in court[]" and Rodriguez's version of the events would tell a different story at trial, Maldonado repeated his story and added he stopped Rodriguez from hitting Doorenbos with the wrench.

Gallagher told him both Zamora and Rodriguez said Maldonado was there the entire time, and they would "talk to [him] until [he] finally decide[d] to tell [them] the story[.]" Gallagher added he did not know how sick Maldonado was, but it was important he tell the truth. Maldonado responded Rodriguez and Zamora killed Doorenbos and he did not do anything. Gallagher replied Maldonado was lying, they had fingerprint evidence, and he wanted to know why they murdered Doorenbos. Maldonado repeated he did not kill Doorenbos. Gallagher told Maldonado his brother and father both said he was involved in the murder and asked why he would put them in the position of having to come to the police station and "say the things [he] should be saying[.]" Maldonado said he was there, but he did not kill him, and he told his father he was "not guilty." Duran said they already knew what happened and they wanted to hear the truth from him. Gallagher said both Zamora and Rodriguez said he stabbed Doorenbos. Maldonado denied stabbing him and said Zamora stabbed him with his knife and Rodriguez hit him on the head with "metal." Officers told Maldonado that he was lying and they could prove he stabbed Doorenbos without his confession. Maldonado explained they took the money and Rodriguez bought a car and a stereo, and he took $200 for gas to go to Mexico.

When Gallagher asked Maldonado whether it was true he stabbed Doorenbos, he replied, "Yeah." Maldonado said it was difficult to admit because he loved his family. Gallagher told Maldonado to do the right thing because Doorenbos had a family too. Maldonado explained Zamora and Rodriguez planned to steal money so they could go to Mexico, but he did not know until after. He stated that when he returned from buying beers, he and Doorebos fought because Doorenbos was angry that he had previously stole money and was not fired. He claimed Zamora got the knife and stabbed Doorenbos in the stomach, and Doorenbos ran inside the kiosk. When he got inside, Rodriguez hit him on the head with the safe lid and Zamora stabbed him in the head, breaking the knife. Maldonado stated he stopped Rodriguez from hitting Doorenbos on

the head and he took the knife from his head, but he did not stab him. Maldonado again denied stabbing Doorenbos, but reiterated he pulled the knife out of his head.

Maldonado stated that because he was HIV positive, he could not remember many things. Duran told Maldonado he had explained much of what happened, but there was more to tell and he would feel better when he had told the entire story. When Duran repeated Zamora and Rodriguez told them that Maldonado had stabbed Doorenbos, Maldonado claimed he could only remember taking the knife out of his head and throwing it. When the officers reminded Maldonado he had already admitted to stabbing Doorenbos, he said the truth was he did not remember and he "possibly stabbed him[.]" Gallagher asked him whether it was true he got into a fight with Doorenbos and stabbed him, Maldonado responded, "Yes." When Gallagher asked him to tell his story from the beginning, Maldonado repeated his story to the point where Zamora first stabbed Doorenbos and said he took the knife from Zamora and threw it, and Doorenbos ran inside the kiosk. Maldonado said Zamora retrieved the knife, but he did not remember stabbing Doorenbos. Duran asked Maldonado how many times he stabbed Doorenbos, he replied, "maybe two times [in the stomach]." Gallagher again asked him to tell his story from the beginning, and after repeating his story, Maldonado said Zamora stabbed him in the stomach and he stabbed him in the stomach "maybe two times" and Doorenbos ran inside.

Maldonado stated he was HIV positive, but he had not been diagnosed with AIDS, and he had to take medication twice a day. He said the medication does not affect his ability to function or think clearly.

C. The Trial Court's Ruling

As we explain above, after hearing the evidence, viewing the videotape, twice, and reading the transcript, the trial court denied Maldonado's motion to suppress the interview. The court ruled Maldonado knowingly and intelligently waived his *Miranda* rights and his statements were voluntary.

D. Analysis

Here, based on the totality of the circumstances, we conclude Maldonado's confession was voluntary and was not the product of coercive police activity. First, we note Duran advised Maldonado of his *Miranda* rights, and Maldonado does not dispute he knowingly and intelligently waived those rights.

At the time of the interview in August 2000, Maldonado was 25 years old. Maldonado contends he was uneducated and not familiar with the criminal justice system, but this evidence was not before the trial court when ruling on the suppression motion. The evidence in fact showed Maldonado was by all accounts a mature adult who eight years earlier, fled the United States realizing there could be severe consequences from his presence at the gas station, and just eight months before his arrest, decided to return to the United States to receive medical treatment for HIV. And despite the passage of time, when officers initially asked him to provide his version of the events, he effortlessly recalled those facts that portrayed him as an innocent bystander who happened upon an assault in progress.

Although Maldonado had AIDS, was recovering from tuberculosis, and had to take medication daily, he stated during the interview he was able to function and think clearly. And he testified during the hearing on the suppression motion officers did not offer him anything to eat or drink, but he conceded his hunger and thirst did not cause him to say anything inaccurate. He also admitted that after initially asking for food and medication, he never asked again. Duran admitted he did not offer Maldonado anything to eat or give him his medication, but he "possibly g[a]ve him something to drink[.]" And Duran testified he did not ask Maldonado if he needed his medication until the end of the interview and he did not learn Maldonado's sister had brought his medication to the police station until after the interview. Additionally, Alcouloumre testified missing one dose of medication or one meal would not pose any immediate outward manifestations. She also testified Maldonado was not required to drink extra fluid

because of his condition. There is no evidence the officers purposefully withheld food, drink, or medication, or coerced him with these items to extract a confession.

After letting Maldonado sit alone for approximately three hours, officers interviewed Maldonado in a standard six by ten-foot, windowless interview room with one door. Two officers questioned Maldonado, but they were in street clothes and unarmed. At the hearing on the suppression motion, the evidence demonstrated the interview lasted more than one hour. Maldonado does not claim either the time before the interview or the time he was interviewed rendered his confession involuntary. There is no evidence Duran or Gallagher at any time threatened Maldonado, promised him favorable treatment if he confessed, or use force to extract a confession. Maldonado's complaint is essentially they lied about and misrepresented the state of the evidence when they said he was lying, his story was unbelievable, Rodriguez's story conflicted with his story, fingerprint evidence linked him to the crime, and they could prove he killed Doorenbos without his confession. (*People v. Smith* (2007) 40 Cal.4th 483, 505 ["police deception 'does not necessarily invalidate an incriminating statement'"].) Maldonado's claim officers wore him down for two and one-half hours before he finally confessed is erroneous. Based on the transcript we have before us, approximately half way through the interview, Maldonado confessed he stabbed Doorenbos and stated it was difficult to admit because he loved his family. Therefore, Maldonado initially confessed no more than one and one-half hours into the interview, and neither this period or the total interview time was unduly excessive. (Cf. *People v. Alfieri* (1979) 95 Cal.App.3d 533, 545-546 [20 hours of interrogation during 36 hours of custody of a 17-year-old suspect with low intelligence and "highly suggest[ive]" psychiatric disorder rendered confession involuntary].)

Maldonado's reliance on *People v. Hogan* (1982) 31 Cal.3d 815 (*Hogan*),[5] and *People v. Azure* (1986) 178 Cal.App.3d 591 (*Azure*),[6] is misplaced. In *Hogan, supra,* 31 Cal.3d at pages 841-842, the California Supreme Court held defendant's confession involuntary because the officer promised to help defendant if he confessed. In *Azure, supra,*178 Cal.App.3d at pages 601-602, the court found defendant's confession was involuntary because the officer stated things would be easier for him if he confessed and harder on him if he did not, and the officer's repeated statements the interrogation would not stop until he confessed. As we explain above, officers did not promise Maldonado any favorable treatment or threaten him. Although Duran did say they would talk to him until he told the truth, this was one isolated comment during a two and one-half hours interrogation. Based on the totality of the circumstances, we conclude Maldonado's confession was "'essentially free'" because officers did not overpower his will. (*People v. Holloway* (2004) 33 Cal.4th 96, 114.)

II. Hypothetical

Maldonado contends the trial court erroneously allowed the prosecutor to cross-examine Costanzo using a hypothetical question because the hypothetical question violated his confrontation rights and it was based on evidence not admitted at trial. Maldonado also contends the prosecutor committed misconduct when he cross-examined Costanzo with the unsupported hypothetical question and when he relied on it during rebuttal argument. Although we agree the hypothetical question was improper, we conclude Maldonado was not prejudiced. We also conclude the prosecutor did not commit misconduct.

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[5] *Hogan* was disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.

[6] *Azure* was disapproved on other grounds in *People v. Markham* (1989) 49 Cal.3d 63, 71, fn. 4.

A. Use Of The Hypothetical Question

As to Maldonado's contention the hypothetical question violated his confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), we disagree. In *Crawford, supra,* 541 U.S. at pages 38, 64, the United States Supreme Court held out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. The Court stated, however, the confrontation clause "does not bar use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Id.* at p. 59, fn. 9; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1225.)

Here, Maldonado's father's statement was not admitted for the truth of the matter asserted. The trial court allowed the prosecutor to cross-examine Costanzo with the hypothetical question to explore the basis of his opinion. We must now address Maldonado's claim the trial court erred in allowing the prosecutor to ask Costanzo the hypothetical question because it was not based on evidence admitted at trial.

"Within limits, the law permits the examination of an expert witness with hypothetical facts. 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however.' [Citation.] 'A hypothetical question . . . may be "framed upon any theory which can be deduced" from *any* evidence properly admitted at trial, including the assumption of "any facts within the limits of the evidence," and a prosecutor may elicit an expert opinion by employing a hypothetical based upon such evidence.' [Citations.] The hypothetical statement of facts posed to an expert witness need not be limited to evidence already admitted into evidence, 'so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For "the law does not accord to the expert's opinion the

same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based."' [Citation.] [¶] Although the field of permissible hypothetical questions is broad, a party cannot use this method of questioning a witness to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced." (*People v. Boyette* (2002) 29 Cal.4th 381, 449.)

On direct examination, defense counsel asked Costanzo what types of cases he accepts and Costanzo responded, "[He] accept[s] cases in which there is some sort of a recording of the interrogation and where there is no strong physical evidence implicating the suspect, something like fingerprints or DNA, that sort of thing." On direct examination, Costanzo testified the majority of confessions are true because there is strong supporting evidence.

We recognize the scope of cross-examination of an expert witness is especially broad and a prosecutor may bring in facts beyond those introduced on direct examination to explore the grounds and reliability of the expert's opinion. However, the evidence the prosecutor relies on must be of a type that is reasonably relied upon by experts in the particular field in forming their opinions and must be reliable. A prosecutor may not use a hypothetical question during cross-examination to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced. That is what the prosecutor did here.

Maldonado's father's statement was in a police report, and this evidence was inadmissible hearsay and could not be admitted into evidence. (*People v. Baeske* (1976) 58 Cal.App.3d 775, 780-781.) The Attorney General points to no other evidence in the record or evidence not then admitted at trial that would have supported the prosecutor's hypothetical question. (*People v. Nye* (1969) 71 Cal.2d 356, 375-377 [prosecuting attorney had in his possession evidence not yet admitted upon which he

based his cross-examination].) The police report was not admitted into evidence, and during cross-examination, the trial court instructed the prosecutor to limit his cross-examination to Maldonado's statement and although the prosecutor had apparently confronted Costanzo with the police report once, the court instructed the prosecutor to not make any further reference to the police report. Although Costanzo testified he may rely on a police report in forming his opinion, because the admissibility of the police report was not litigated, and the Attorney General does not advance any theory for its admissibility, we cannot conclude the police report, or any statements in the police report, were reliable. Because there was no admissible, reliable evidence to support the hypothetical question, the trial court erroneously allowed the prosecutor to cross-examine Costanzo with the hypothetical question. We must now address whether Maldonado was prejudiced by this evidentiary error. We review his claim of prejudice pursuant *People v. Watson* (1956) 46 Cal.2d 818, 821, because the prosecutor's use of the hypothetical question was not fundamentally unfair—the court limited its use as to Costanzo's credibility and did not admit Maldonado's statement to his father for its truth. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Based on the entire record before us, we conclude it was not reasonably probable Maldonado would have received a more favorable verdict had the trial court prohibited the prosecutor from asking Costanzo the hypothetical question. First, Maldonado confessed during his interview with Castro and Gallagher he stabbed Doorenbos, and as we explain above, officers did not coerce him into confessing. Additionally, Conley found three shoe prints in blood stains at the gas station, corroborating the evidence Maldonado, Zamora, and Rodriguez were present when Doorenbos was murdered. And, just days after Doorenbos was killed, Maldonado fled to Mexico, evidence of a guilty conscience.

Finally, both during the prosecutor's cross-examination of Costanzo and during jury instructions, the trial court instructed the jury with Judicial Council of

California Criminal Jury Instructions (2008) CALCRIM No. 303, "Limited Purpose Evidence In General," that the jury was to consider this evidence only as to Costanzo's credibility and not for its truth. Thus, Maldonado's contention his father's statement corroborated his confession is meritless. The court also instructed the jury with CALCRIM No. 104, "Evidence," instructing the jury to not assume something is true because an attorney asked a question that suggested it was true. The court also instructed the jury with CALCRIM No. 332, "Expert Witness Testimony," explaining how to evaluate an expert witness's testimony.[7] Maldonado claims the hypothetical question undermined Costanzo's credibility and affected the jury's deliberations. This is pure speculation. We presume jurors are intelligent people capable of understanding the instructions and applying them to the facts of the case. (*People v. Carey* (2007) 41 Cal.4th 109, 130 (*Casey*).)

B. Prosecutorial Misconduct

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.]'" (*People v. Parson* (2008) 44 Cal.4th 332, 359.) A prosecutor commits misconduct when he or she knowingly elicits testimony that is inadmissible. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1020.) A prosecutor

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[7] The clerk's transcript does not include a copy of the jury instructions given in this case. The clerk's transcript does include a copy of the "proposed jury instructions" in power point format, which we assume were the instructions the trial court used. We note the trial court instructed the jury with CALCRIM No. 332, "Expert Witness Testimony," but the court did not include that portion of the instruction concerning hypothetical questions. It should have. As we explain above, the prosecutor asked Costanzo a hypothetical question. Maldonado does not argue this was error. And in any event, this error was harmless as we explain above.

commits misconduct when he or she argues facts not in evidence. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1316.)

Here, as we explain above, defense counsel elicited testimony from Costanzo that he only takes cases where there is a recorded interrogation and no strong physical evidence implicating the suspect, and the trial court ruled the prosecutor could ask Costanzo the hypothetical question to challenge the basis and soundness of Costanzo's expert opinion. The prosecutor did not commit misconduct in asking Costanzo the hypothetical question concerning Maldonado's father's statement in the police report, even though we conclude the hypothetical question was improper. The trial court ruled the prosecutor could ask Costanzo the hypothetical question after exhaustively considering the matter. And there is authority for the proposition an expert witness may consider hearsay statements in forming an opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) The prosecutor did not commit misconduct when he asked Costanzo the hypothetical questions.

With respect to closing argument, the prosecutor did not mention Maldonado's father, or Maldonado's statement to his father. After defense counsel argued if Maldonado's father's testimony was so important, the prosecutor could have subpoenaed him to testify, the trial court allowed the prosecutor, over defense counsel's objection, to show the jury a slide that read in part: "'Statement to the father re[garding] him killing . . . Doorenbos was subject brought up with defense witness Costanzo.'" The prosecutor did not argue the jury should consider Maldonado's father's statement for its truth, but only that the jury could draw reasonable inferences from the hypothetical as to Costanzo's credibility subject to the trial court's limiting instruction. And the trial court instructed the jury as to the permissible use of this evidence. Based on the trial court's ruling, the prosecutor was justified in arguing the jury could consider the hypothetical question as to Costanzo's credibility.

The prosecutor also argued that if Maldonado's father had favorable evidence, he would have testified. The prosecutor also stated that if the prosecutor could have located Maldonado's father, the prosecutor would have subpoenaed him to testify. Although a prosecutor may comment "on the defense's failure to call logical witnesses" (*People v. Woods* (2006) 146 Cal.App.4th 106, 112-113), the Attorney General points to no evidence in the record to support its contention the prosecutor attempted to locate Maldonado's father and could not. Therefore, the prosecutor was essentially testifying to this fact, which is improper. However, any error was cured by the jury instructions. The trial court instructed the jury with CALCRIM No. 300, "All Available Evidence," stating neither side was required to call all witnesses who may have information about the case, and CALCRIM No. 222, "Evidence," that nothing the attorneys say during trial or argument is evidence. Again, we presume jurors are intelligent people capable of understanding the instructions and applying them to the facts of the case. (*Carey, supra,* 41 Cal.4th at p. 130.)

DISPOSITION

The judgment is affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.